Naung Felix Sitom v Pendakwa Raya

HIGH COURT (TAWAU) — CRIMINAL APPEAL NO T (42) 32 OF 1998 — [1999] MLJU190
RICHARD MALANJUM J
28 APRIL 1999

Land Law *— Alienation and incidents — State land — Appellant was convicted with possesion and non-payment of royalty for pieces of log cultivated from the said land — Whether the said land was already alienated at the material time of the offence — Meaning of 'alienation' — Whether land had been under native customary tenure — Sabah Forests Enactment 1968 ss 2, 41 — Sabah Land Ordinance s 67(2)*

The appellant was found in possession of 24 pieces of log. The investigation by the Forestry Department revealed that no royalty was paid for those logs. The appellant was convicted for an offence under s 30(1)(g) of the Sabah Forests Enactment 1968 ('the Enactment'). The appellant appealed. The defence of the appellant was that he went into the land ('the said land') which was applied by his father since 1977/78 to get some wood as beams for the construction of his house. According to him the trees in the said land were not the original trees as the area had been cleared before. In his evidence, the appellant's father said that his application for the said land had been approved and since 1978 he had been cultivating the said land planting various crops. However he conceded that so far no title deed had been issued to him. The appellant submitted that: (i) the said land was already an alienated land at the material time; and (ii) the said land had already been under native customary tenure. The respondent argued that the said land could not be described as an alienated land since it had no title deed issued as required by law and the claim of native customary right or tenure did not entitle a title but only to establish a claim.

Held, allowing the appeal:

(1) An alienated land as defined in the Enactment is not limited to land having a title deed issued. Section 2 of the Enactment provides the answer. And that being the case a person having native customary tenure as defined in the Sabah land Ordinance should be accorded the same status as one that is in possession of a title deed. In fact s 67(2) of the Sabah Land Ordinance only gives the Collector discretion to require a native holding land under native customary tenure to acquire a title deed. As such in the instant case there is no reason why the said land should not be described as an alienated land within the context of the definition as found in s 2 of the Enactment (see p 611E–G).

(2) As there was no dispute on the source of the logs found in the possession of the appellant it could be concluded that the logs came from an alienated land. It follows that the proviso to the definition of 'forest produce' should apply. After all there was also

no challenge to the assertion of the appellant that the trees he felled were not the natural uncultivated trees (see p 611G–H). A

(3) In the event that the court was wrong, the court was also of the view that s 41 of the Enactment should apply. There was no dispute on the assertion of the appellant that he felled the trees intending to use them as materials for the constructions of his house. And although the charge was for non-payment of royalty, such an issue should not arise in the first place if s 41 is applicable. The appellant was caught while transporting the logs and hence that was removal permissible under the said section (see pp 610H–I, 612A–B). B C

[Bahasa Malaysia summary

Perayu didapati memliki 24 batang kayu balak. Siasatan oleh Jabatan Perhutanan menunjukkan bahawa tiada royalti dibayar untuk kayu balak-kayu balak tersebut. Perayu tersebut telah disabitkan untuk kesalahan di bawah s 30(1)(g) Enakmen Perhutanan Sabah 1968 ('Enakmen tersebut'). Perayu telah merayu. Pembelaan perayu adalah bahawa beliau memasuki tanah tersebut ('tanah tersebut') yang dipohon oleh bapanya sejak 1977/78 untuk mendapatkan kayu sebagai kayu penyokong bumbung untuk pembinaan rumahnya. Menurutnya pokok-pokok tersebut di dalam tanah tersebut bukanlah pokok yang asli kerana kawasan tersebut telah pun diterangkan dahulu. Di dalam keterangannya, bapa perayu mengatakan bahawa permohonannya untuk tanah tersebut telah pun diluluskan dan sejak 1978 beliau telah mengusahakan tanah tersebut dengan menanam pelbagai jenis tanaman. Namun beliau bersetuju bahawa sehingga kini tiada suratan hak milik telah dikeluarkan kepadanya. Perayu menghujahkan bahawa: (i) tanah tersebut telah pun diberimilik pada masa tersebut; dan (ii) tanah tesebut telah pun berada di bawah hak penduduk peribumi. Responden menghujahkan bahawa tanah tersebut tidak boleh dinyatakan sebagai tanah yang berimilik oleh kerana ia tidak mempunyai suratan hak milik dikeluarkan seperti yang diperlukan oleh undang-undang dan tuntutan hak adat peribumi tidak memberi hak kepada hak milik tetapi hanya menunjukkan suatu tuntutan. D E F G

Diputuskan, membenarkan rayuan tersebut: H

(1) Suatu tanah yang diberimilik seperti yang didefinasikan di dalam Enakmen tidak terhad kepada tanah yang mempunyai suatu suratan hak milik dikeluarkan. Seksyen 2 Enakmen tersebut memberikan jawapan tersebut. Oleh kerana tersebut seseorang yang mempunyai hak peribumi seperti yang didefinasikan di dalam Ordinan Tanah Sabah mestilah diberikan status yang sama seperti seseorang yang memiliki suratan hak milik. Hakikatnya s 67(2) Ordinan Tanah Sabah hanya memberikan Pemungut budi I

bicara untuk memerlukan seorang peribumi yang memegang tanah di bawah hak tanah peribumi untuk memperolehi hak milik. Dengan itu di dalam kes ini tiada sebab mengapa tanah tersebut tidak sepatutnya digambarkan sebagai tanah yang diberimilik di dalam konteks di dalam definasi seperti yang didapati di dalam s 2 Enakmen tersebut (lihat ms 611E–G).

(2) Oleh kerana terdapat pertikaian berkenaan dengan punca kayu balak-kayu balak tersebut yang ditemui dalam milikan perayu ia tidak boleh disimpulkan bahawa kayu balak-kayu balak tersebut berpunca daripada tanah yang diberi milik. Berikutannya bahawa proviso kepada definasi 'hasil hutan' sepatutnya terpakai. Lebih-lebih lagi tiada cabaran kepada penegasan perayu tersebut bahawa pokok-pokok yang ditebangnya bukanlah pokok-pokok asli yang bukannya sengaja ditanam (lihat ms 611G–H).

(3) Jika mahkamah adalah silap, mahkamah adalah berpendapat bahawa s 41 Enakmen tersebut sepatutnya terpakai. Juga tiada pertikaian di atas penegasan perayu bahawa beliau menebang pokok untuk digunakannya sebagai bahan-bahan untuk pembinaan rumahnya. Dan walaupun pendakwaan adalah ketiadaan pembayaran royalti, isu sedemikian tidak sepatutnya bangkit pada mulanya jika s 41 adalah terpakai. Perayu telah ditangkap semasa mengangkut balak-balak tersebut dan dengan itu adalah pengalihan yang dibenarkan di bawah seksyen tersebut (lihat ms 610H–I, 612A–B).]

Notes

For cases on alienation and incidents generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1559–1581.

Legislation referred to

Sabah Forests Enactment 1968 ss 2, 30(1)(g), (2)(b), 37(3), 41
Sabah Land Ordinance ss 4, 15, 65, 66, 67(2), 88

Ronny Cham Esq (*Ronny Cham & Co*) and *Francis Wong Esq* (*Peter Lo & Co*) for the appellant.

Richard Malanjum J: This is an appeal by the appellant against his conviction and sentence on a charge under s 30(1)(g) of the Sabah Forests Enactment 1968 ('the Enactment') and punishable under s 30(2)(b) of the Enactment. He was found guilty and sentenced to a fine of RM3000 in default two months imprisonment. The logs found in his possession as well as the vehicle used in the commission of the offence were also forfeited pursuant to s 37(3) of the Enactment.

Briefly it was the prosecution case that on 19 November 1997 at about 7.40 pm a group of personnel from the Forestry Department saw a lorry model Isuzu and bearing registration number SA 7871N around Kilometer

7, Jalan Tungku/Lahad Datu. At that time the lorry had a tyre punctured and was thus being replaced. The personnel carried out inspection and they discovered that the lorry was carrying 24 pieces of log. The logs were covered with canvas. As there was no proper document from the Forestry Department produced for the transportation of those logs the lorry together with its driver were taken to the Forestry Office for further investigation. A police report was also subsequently lodged on the matter. The result of the investigation by the Forestry Department was that no royalty was paid for those logs. As such the appellant was indicted for the offence as per charge.

Basically the defence of the appellant was that he went into the land ('the said land') which had been applied for by his father since 1977/78 to get some wood as beams for the construction of his house. According to him the trees on the said land were not the original trees as the area had been cleared before. He also said that he is a native of Kadazan/Dusun/Iban race.

The appellant called his father (DW 2) as his witness. In his evidence DW2 said that he applied for the said land. His application had been approved. And since 1978 he has been cultivating the said land planting various crops such as cocoa, oil palm seedlings and fruit trees. However he conceded that so far no title deed has been issued to him. He nevertheless produced a letter from the Jabatan Tanah dan Ukur dated 12 November 1980 (exh D 1) authorizing the survey of the said land. In fact there were two applicants, DW2 and another with the total area of 30 acres.

There was also locus in quo carried out by the learned sessions court judge. It is not in dispute that cocoa trees are found planted on the said land.

In finding the appellant guilty of the charge the learned sessions court judge ('SCJ') found that the appellant admitted felling the trees and loading them onto the lorry to be taken home. As such she concluded that possession and knowledge were shown. She also found that no royalty had been paid for those logs. And the learned SCJ did not accept the assertion of the appellant on the said land being an alienated land. She found no evidence to that effect. Thus her conclusion was that the prosecution had proved its case beyond reasonable doubt. The appellant was therefore convicted.

The appellant submitted on all eight grounds in this appeal. However they can be summarized as:

(1) that the said land was already an alienated land at the material time; and

(2) that the said land has already been under native customary tenure.

As such the exception within the meaning of 'forest produce' in s 2 of the Enactment comes into play.

For the respondent, the learned deputy public prosecutor argued that the said land could not be described as an alienated land since it has no title deed issued as required by law. And to the claim of native customary right or tenure the learned deputy contended that it did not entitle a title but only to establish a claim.

A At first blush this case appears to be founded on a simple question of whether or not the said land was indeed already an alienated land at that time. And that seems to be the approach adopted by the learned SCJ. However, on further perusal of the relevant laws, in particular the Sabah Land Ordinance and the Enactment, I am of the view that there is a wider implication to whatever the decision that may be made in this case. There B are questions of the scope of native rights and native customary tenure in relation to the taking of forest produce under the Enactment.

I will start by referring to the relevant provisions of the Enactment.

Section 2 of the Enactment on the definitions of an 'alienated land' and 'forest produce' read:

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> 'alienated lands' means any land in respect of which a registered title for the time being subsists under any written law relating to land title registration, land tenure or mining, or *which has become in any manner vested in any person or authority other than the State;*' (Emphasis added.)
> 'forest produce' means —
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> D (a) the following when found in or brought from a Forest Reserve, State land or alienated land — timber, firewood, charcoal, getah, wood oil, bark, extracts of bark, copal, damar and atap:
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> *Provided that in the case of alienated land this paragraph shall only apply to the produce of natural uncultivated trees or plants*; (Emphasis added.)

E And s 30(1)(g) of the Enactment provides:

> 30 General offences.
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> (1) Any person who, without lawful authority or legal right —
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> (g) keeps or has in his possession, custody or control any forest produce which bears any property mark or in respect of which a forest offence has been committed or upon which the royalty or other payment due in respect thereof has not been paid or made;
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> G ...
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> ...
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> shall be guilty of an offence.

The penalty under sub-s (2) reads:

H (2) Any person guilty of an offence under sub-s (1) shall on conviction be liable —

(a) ...

...

(b) if the offence is under para (g) of sub-s (1), to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both such fine and imprisonment; ... .

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There is another section that neither party referred to. And that is s 41 of the Enactment which reads:

41 Saving of native rights.

Subject to any provisions of the rules prohibiting or regulating the cutting or removal of any specified form of forest produce or prohibiting or regulating the cutting or removal of all or any forest produce in any specified locality, *nothing in this Enactment shall be deemed to prohibit the cutting and removal from State land which is not for the time being in the lawful occupation of some person or, with the permission of the owner thereof, from alienated land, by any native of any timber, atap or other forest produce which may be necessary* —

(a) *for the construction or repair of a dwelling-house for the abode of himself and his family*;

(b) for the construction of fences and temporary huts on any land lawfully occupied by him;

(c) for the construction or repair of native boats;

(d) for the upkeep of his fishing stakes and landing places;

(e) for fire-wood to be consumed for his domestic purposes; or

(f) for the construction and upkeep of clinics, schools, community halls, places of worship, bridges and any work for the common benefit of the native in-habitants of his kampung.

(Emphasis added.)

As for the Sabah Land Ordinance ('the Ordinance') the pertinent sections with emphasis added are as follows:

Section 4 of the Ordinance on the definition of 'alienate' states:

'alienate' means to lease, or otherwise dispose of State land on behalf of the Government in consideration of the payment of such rent and of such premium, if any, as may be required;

On native customary rights s 15 of the Ordinance provides:

Native customary rights shall be held to be —

(a) *land possessed by customary tenure*;

(b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;

(c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or unkempt and regularly enjoyed by him as his personal property;

(d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;

(e) land that has been cultivated or built on within three years;

(f) burial grounds or shrines;

(g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

(Emphasis added.)

And ss 65 and 66 of the Ordinance read:

65 *'Customary tenure' means the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years* or by

A title under this Part or under the Poll Tax Ordinance *, or Part IV of the Land Ordinance, 1913.

* Poll Tax Ordinance was repealed by Ordinance No 14 of 1962.

66 *Customary tenure shall confer upon the holder thereunder a permanent heritable and transferable right of use and occupancy in his land* subject only, in addition to the general provisions of Part I of this Ordinance to —

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(a) the duty of preparing his padi fields and planting padi, cleaning, working and cultivating his garden, orchards or sago lands in such manner as may be prescribed;

(b) the liability to give his labour free, when required by the Collector or Native Chief or Headman, for the performance of such works and duties for the common benefit of himself and neighbouring land holders as may be prescribed

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(Emphasis added.)

Whereas s 67(2) of the Ordinance provides:

(2) Any native who holds his land under customary tenure without documentary title *may be required* by order of the Collector in writing to take out title by entry in the Native Title Register and to pay the prescribed fees for such title. (Emphasis added.)

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And finally s 88 of the Ordinance reads:

88 No new title and no dealing with, claim to or interest in any land *except land still held under native customary tenure without documentary title* shall be valid until it has been registered in accordance with the provision of this Part. (Emphasis added.)

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On careful perusal of the sections quoted above it is my considered opinion that an alienated land as defined in the Enactment is not limited to land having a title deed issued. Section 2 of the Enactment provides the answer. And that being the case a person having native customary tenure as defined in the Sabah Land Ordinance should be accorded the same status as one that is in possession of a title deed. In fact s 67(2) of the Ordinance that was relied upon by the learned Deputy only gives the Collector discretion to require a native holding land under native customary tenure to acquire a title deed. As such in the instant case there is no reason why the said land in question should not be described as an alienated land within the context of the definition as found in s 2 of the Enactment.

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Accordingly, as there was no dispute on the source of the logs found in the possession of the appellant it could be concluded that the logs came from an alienated land. It follows that the proviso to the definition of 'forest produce' should apply. After all there was also no challenge to the assertion of the appellant that the trees he felled were not the natural uncultivated trees. On this ground therefore, this appeal should be allowed with the conviction and sentence set aside.

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In the event that I am wrong in the foregoing conclusion, I am also of the view that s 41 of the Enactment should apply. I am aware that such a point was not canvassed. But in the interest of justice I should take it into account in the instant case. As such in the exercise of my revisionary power

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I should revise this case in that the conviction and sentence should be set aside. There was no dispute on the assertion of the appellant that he fell the trees intending to use them as materials for the construction of his house. And although the charge was for non-payment of royalty, such an issue should not arise in the first place if s 41 of the Enactment is applicable. The appellant was caught while transporting the logs and hence that is removal permissible under the said section.

The conviction and sentence of the appellant are set aside for the reasons hereinabove. Any fine paid should be refunded and the order for forfeiture of the lorry and the logs is hereby set aside as well.

Appeal allowed.

Reported by Jafisah Jaafar